IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No. 31

WYANDOTTE TRANSPORTATION COMPANY, UNION BARGE LINE CORPORATION and CARGILL, INC., et al.,

Petitioners,

versus

UNITED STATES OF AMERICA,

Respondent.

BRIEF FOR PETITIONERS.

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BRIEF FOR PETITIONERS.

CITATION TO OPINIONS BELOW

The opinion of the District Court entered on June 30, 1964, is reported only at 1964 A.M.C. 1742. The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 367 F.2d 971. Both opinions, together with the Court of Appeals' opinion and order denying rehearing, are reproduced in Appendices A, B and C.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

The judgment of the Court of Appeals was entered on July 13, 1966. A petition for rehearing *en banc* was timely

filed, and an order denying the rehearing was entered on September 12, 1966. The petition for a writ of certiorari was filed on December 7, 1966, and was granted on February 13, 1967. (R. 174)

STATUTES INVOLVED

The statutes involved are material parts of the Rivers and Harbors Act of March 3, 1899, 30 Stat. 1151 *et seq.*, as amended: 33 U.S.C. § 401 *et seq.*, consisting of § 10, 33 U.S.C. § 403; § 12, 33 U.S.C. § 406; § 15, 33 U.S.C. § 409; § 16, 33 U.S.C. § 411 and 33 U.S.C. § 412; § 19, 33 U.S.C. § 414; § 20; 33 U.S.C. § 415; and 42 U.S.C. § 1855, *et seq.* The statutes are printed in Appendix D.

QUESTIONS PRESENTED

(1) Whether a vessel owner or other party, who by negligence causes a vessel to sink and become an obstruction to navigation, is liable *in personam* to the United States for the costs incurred by the United States in removing the obstruction.

(2) Whether a sunken vessel constitutes an "obstruction" to navigation under § 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. § 403), the removal of which could have been enforced by injunction pursuant to the provisions of § 12 of the Rivers and Harbors Act of 1899 (33 U.S.C. § 406).

(3) Whether the funds expended by the Government to raise WYCHEM 112 under the Disaster Relief Act, 42 U.S.C. § 1885, *et seq.*, are recoverable from the petitioners.

STATEMENT OF THE CASE

Two cases are involved here. They were consolidated by the District Court for disposition of the motions to dis-

miss and/or for summary judgment filed by all of the respondents below, petitioners herein.

In the case of *United States v. Wyandotte Transportation Co., et al,* involving the Barge WYCHEM 112, the parties respondent before the District Court and the Court of Appeals were Wyandotte Transportation Company, owner of the WYCHEM 112; Union Carbide Corporation, owner of the chlorine cargo; and Union Barge Line Corporation, owner and operator of the M/V EASTERN, which had the WYCHEM 112 in tow at the time of the sinking. The facts as alleged in the libel and as adopted by the Court of Appeals were as follows:

On March 15-17, 1961, a cargo of 2,200,000 pounds of liquid chlorine was loaded into the tanks of the WYCHEM 112 at Geismar, Louisiana, for delivery to Union Carbide Corporation at South Charleston, West Virginia. On March 21, 1961, the WYCHEM 112 and other barges in tow of the EASTERN departed from Geismar, Louisiana, bound up the Mississippi River. On March 23, 1961, with weather and visibility good, but with a strong current, the WYCHEM 112, the lead barge on the port or left-hand side of the tow, began to dive, putting her bow down and her stern up. She sank near Vidalia, Louisiana, in the Mississippi River. Repeated efforts were made by the owners and operators of the barge during the spring and summer of 1961 to locate and raise the barge. These efforts were unsuccessful, and in November, 1961, Wyandotte tendered abandonment of the barge to the Government. (R. 36) On September 25, 1962, the District Engineer, Corps of Engineers, Vicksburg District, wrote to Wyandotte, advising that the Secretary of the Army had determined that the sunken Barge WYCHEM 112 was an obstruction to navigation; that Wyandotte's tender of

abandonment was accepted; that the Engineers were proceeding under the authority of the Secretary of the Army to remove the barge under the provisions of § 19 of the Rivers and Harbors Act of 3 March 1899 (33 U.S.C. § 414); and that after recovery of the Barge WYCHEM 112 and/or its cargo, the United States would retain the right of possession and title thereto. (R. 42) In view of the Government's opinion that the chlorine constituted a hazard to public health and safety, the President on October 10, 1962, proclaimed it a major disaster. The tanks were removed at an alleged cost of $3,081,000. The United States then brought suit *in rem* against the barge and her cargo and against Wyandotte Transportation Co., Union Carbide Corporation, and Union Barge Line Corporation. On motion of the United States, the District Court ordered the sale of the chlorine cargo, which had been seized by the United States Marshal at the commencement of the proceedings, and the proceeds were paid into Court pending final disposition of the litigation.

In the second case, *United States v. Cargill, Inc., et al*, the respondents are the former owners, managers, charterers, and insurers of the sunken Barges L-1 and M-65. Again, the facts alleged by the Government and adopted by the District Court and the Court of Appeals were that the M-65, owned by Jeffersonville Boat and Machine Co., and the L-1, owned by Cargo Carriers, Inc., were moored by a tug at the Cargill fleet at Jackson's Landing, Mile 227.5 A.H.P., Baton Rouge, Louisiana, on March 30, 1961. The next day the Tanker ESSO ZURICH, bound upriver for Baton Rouge, collided with and sank an unmanned and unlighted barge, which was drifting in the channel. The incident was reported by radio to the barge fleet at Baton Rouge, and the two Barges L-1 and M-65, were discovered missing. Although only one barge, believed to be the L-1,

was located and showed marks of collision, both Barges L-1 and M-65, were reported by Cargo Carriers as sunk. Cargo Carriers then marked the barges for day and night navigation. On April 9, 20 and 26, 1962, Inland Rivers Transportation Co. and Cargo Carriers, Inc. wired the District Engineer that they had abandoned the Barges L-1 and M-65 and considered the Government as owner of the vessels. The United States declined to accept abandonment or the responsibility for marking and removing the wrecks. The United States then filed a declaratory judgment action against the owners, managers, charterers and underwriters of the barges alleging negligence in the condition and mooring of the barges and praying that the Court decree that the responsibility "of marking and removing the wrecks remains with the respondents." The barges remain unremoved.

The respondents in both actions moved to dismiss and/or for summary judgment. On June 30, 1964, the District Court granted the motions for summary judgment and dismissed both actions. (R. 146-147). In its Reasons for Judgment, the District Court held that the only right which the Government had to recover the removal costs was an *in rem* right against the sunken vessels and that there was no *in personam* right against any of the respondents. (R. 146)

The Court of Appeals for the Fifth Circuit reversed the judgments of dismissal and remanded the cases to the District Court for trial and a determination as to whether the sinking of the vessels resulted from the negligence of any of the respondents. (R. 150-165 and 166). The Court held that if the respondents in the WYCHEM case are found to be negligent, the Government is entitled to recover those removal costs reasonably flowing from such

negligence and subsequent failure to raise the barge. If any respondent in the Cargill case is found negligent, the District Court was directed to order such respondent to raise the two sunken barges or bear the reasonable costs of their removal.

All of the respondents with the exception of Union Carbide Corporation joined in a petition for rehearing *en banc*. In a separate petition, Union Carbide requested that the judgment of the District Court be affirmed. On September 12, 1966, the Court of Appeals granted the petition of Union Carbide and denied the petition of the other respondents. (R. 167) The remaining respondents thereafter filed a petition for a writ of certiorari, which was granted by this Court on February 13, 1967. (R. 174)

SUMMARY OF ARGUMENT

Never before, or since, the decision of the Court of Appeals for the Fifth Circuit, in the instant case, has a court held that in the event of a shipwreck, the owner of the sunken vessel or any other party, if found negligent, is personally liable for the cost of removal, or that the removal of the sunken vessel may be compelled by injunctive process. The jurisprudence, which includes decisions of the Courts of Appeal of the Third, Fourth, and Ninth Circuits, is uniform to the effect that a negligent owner or other tortfeasor is not personally responsible for costs of removal of a sunken vessel.

The Rivers and Harbors Act of 1899 (33 U.S.C. 403, *et seq.*) and the history of that Statute do not support the decision of the Court of Appeals. Section 406 (§ 12), which makes provision for injunctive relief, applies only to Sections 401 (§ 9), 403 (§ 10), and 404 (§ 11). These Sections do not by their terms apply to vessels, and at most relate only to structures or obstructions built, erected, or

created by willful, intentional, or deliberate acts. No court other than the Court of Appeals for the Fifth Circuit in the instant case, has held that Section 403 (§ 10) applies to a shipwreck if caused by negligence. A single decision, *United States vs. Hall*, 63 Fed. 472 (1894) of the First Circuit, held that a vessel willfully or intentionally sunk was an obstruction within the meaning of § 10 of the Rivers and Harbors Act of **1890, the Statute preceding the one presently in effect,** and its removal could be compelled by injunctive process. That case, even if correctly decided, clearly has no application to the instant case.

The Wreck Statute proper, which applies to shipwrecks, is found in Sections 409 (§ 15), 414 (§ 19), and 415 (§ 20). Penalties are provided for violation of Section 409 (§ 15) by Section 411 (§ 16), which makes it unlawful to sink vessels or other craft in navigable channels, and it is significant that Section 411 (§ 16) does not provide for injunctive process. The remaining Sections of the Wreck Statute, Sections 414 (§ 19) and 415 (§ 20), both give the Secretary of the Army the right to take possession of and to remove a sunken vessel; Section 415 (§ 20) specifically provides that the removal expense "shall be a charge against such craft and cargo," and under both Sections 414 (§ 19) and 415 (§ 20) the vessel and cargo may be sold and the proceeds of the sale covered into the Treasury of the United States. There is not one word in these Sections of the Statute dealing with shipwrecks about injunctive relief, or giving the Government any remedy against any party, in addition to the *in rem* right against the sunken vessel and her cargo.

As the injunctive remedy provided by Section 406 (§ 12) is applicable only to structures or obstructions other than vessels, willfully, deliberately, or purposefully constructed or created, there is no basis for a remedy by in-

plication in favor of the Government in the nature of personal responsibility for the cost of removal on the part of a vessel owner or any other party.

The change in the statute for which the Government argues should be sought through the legislative process, where all interests would have an opportunity to be heard, and where the final decision would be made, after deliberation by the Congress.

ARGUMENT

THE DECISION BELOW IS NOT JUSTIFIED BY THE HISTORY OF THE RIVERS AND HARBORS ACT OF 1899 OR BY PRIOR JURISPRUDENCE

In holding that a vessel negligently sunk in a navigable channel constitutes an "obstruction" within the meaning of § 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. § 403) and that its removal may be compelled by injunctive process pursuant to § 12 of that Statute (33 U.S.C. § 406), or that the owners or other parties responsible for the sinking may be required to bear the costs of removal incurred by the Government, the opinion of the Fifth Circuit stands alone in the jurisprudence. It is the submission of petitioners that in so holding the Court of Appeals misconstrued the provisions of the Rivers and Harbors Act of 1899, and failed to follow the clear and unequivocal jurisprudence established by all of the other circuits which have considered this matter.

Since the early part of the nineteenth century Congress has been aware of the problems involved in creating and maintaining the navigability of the inland waterways, and in 1824 for the first time adopted an act to improve the navigation of the Ohio and Mississippi Rivers, 4 Stat. 32.

Between 1824 and 1880 Congress dealt with the problem of sunken vessels on an individual basis and enacted specific appropriation bills to raise certain wrecks. See, for example, 4 Stat. 173; 5 Stat. 129; 15 Stat. 174; 17 Stat. 373; and 21 Stat. 61. The first federal Wreck Statute, § 4 of the Rivers and Harbors Appropriation Act of 1880, 21 Stat. 197, gave the War Department power to advertise notice in order to establish as a matter of law that a sunken vessel was a derelict and made a permanent appropriation for the removal of wrecks from the navigable waters of the United States. In 1882, this statute was amended to permit the sale of a sunken wreck to the contractor, 22 Stat. 208. In 1890, Congress added a provision that wrecks not raised within two months were subject to being broken up and removed by the War Department without liability for damage to the owners. 26 Stat. 454, § 8.

In 1899, Congress enacted the Rivers and Harbors Act of 1899 (33 U.S.C. § 401, § 403 *et seq.*, 30 Stat. 1151 *et seq.*) This Statute sets forth a considered, comprehensive scheme relating to obstructions to the navigable capacity of waters of the United States and to sunken vessels. Section 401 (§ 9) makes it unlawful to construct any "bridge, dam, dike, or causeway" over or in any navigable water. Section 403 (§ 10) contains two parts. First, it prohibits "the creation of any obstruction * * * to the navigable capacity of any of the waters of the United States," and, second, provides that it shall be unlawful to build "any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures" in the navigable waters. Section 404 (§ 11) authorizes the Secretary of the Army to establish certain harbor lines beyond which no piers, wharves, bulkheads, or other works shall be extended. Section 406 (§ 12) then provides that every person violating the provisions of Sections 401, 403 and 404 (§§ 9, 10 and 11) shall

be deemed guilty of a misdemeanor and subject to fine and imprisonment. This Section then provides that "the removal of any **structures** or parts of structures **erected** in violation of the provisions of said sections" (Section 401 [§ 9], Section 402 and Section 403 [§ 10]) may be enforced by injunctive process. (Emphasis supplied.) No reference is made to removal of the **obstructions** prohibited by Section 403 (§ 10).

The Wreck Statute proper is set forth in 33 U.S.C. §§ 409, 414 and 415 (§§ 15, 19 and 20). Section 409 (§ 15) makes it unlawful to sink, voluntarily or carelessly, or to permit or cause to be sunk, vessels or other craft in navigable channels. It further provides that whenever a vessel or other craft is wrecked in a navigable channel, accidentally or otherwise, it shall be the duty of the owner of said sunken craft immediately to mark it and to maintain the marking until the sunken craft is removed or abandoned. Finally, it is the duty of the owner of the sunken craft to commence the immediate removal of same, and to prosecute it diligently and "failure to do so shall be considered as an abandonment of said craft, and subject the same to removal by the United States as provided for in the act." Section 411 (§ 16) then provides that every person violating the provisions of Section 409 (§ 15) shall be deemed guilty of a misdemeanor and subject to fine and imprisonment.

It is noteworthy that Section 411 (§ 16), the penalty section applicable to Section 409 (§ 15), unlike Section 406 (§ 12), the penalty section applicable to Section 403 (§ 10), does not contain any provision authorizing the removal of sunken craft by injunctive process. On the contrary, Section 414 (§ 19) provides that whenever the navigation of any waterway in the United States "shall be **obstructed**" by any sunken vessel, and such "**obstruction**" has existed

for a period longer than thirty days, or whenever the abandonment of such **"obstruction"** can be legally established within a period less than thirty days, the sunken vessel shall be subject to be broken up, removed, or otherwise disposed of by the Secretary of the Army at his discretion without liability for damage to the owners, and any money received from the sale of any such wreck shall be covered into the Treasury of the United States.

Section 415 (§ 20) gives the Secretary of the Army, "under emergency", the right to take immediate possession of any sunken vessel or craft, and to remove same immediately. This section provides specifically that the removal expense "shall be a charge against such craft and cargo", and if the owners fail or refuse to reimburse the Government for the removal expense, then the craft or cargo may be sold and the proceeds of the sale covered into the Treasury of the United States.

Congress has continued an annual appropriation for "removing sunken vessels or craft obstructing or endangering navigation." 31 U.S.C. § 725a.

The scheme of the Statute is therefore readily apparent. In the case of bridges, etc. (Section 401 [§ 9]) obstructions such as "wharves, piers * * * or other structures" (Section 403 [§ 10]), or excavations or fills (Section 403 [§ 10]), the violator is subject to fine and imprisonment, and the Government is authorized to require their removal by injunctive process, 33 U.S.C. § 406 (§ 12). On the other hand, in the case of obstructions resulting from sunken vessels, either "accidentally or otherwise," the owner is required to remove the sunken vessel or to forfeit his interest therein to the Government, which is then required to effect the removal and is authorized to retain the proceeds of the sale of the sunken craft. There is not one

word in the Statute about recovery of these expenses from any other source, and the Statute does not give the Secretary of the Army any authority to compel the owner of a negligently sunken vessel or any other party to remove it by injunction or otherwise. The only right against the world is the *in rem* right against the sunken vessel and its cargo.

As stated by the Court of Appeals for the Fourth Circuit in *United States v. Moran Towing and Transportation Company*, 374 F. 2d 656 (1967) (at p. 666), "Cargill (the instant case) represents an abrupt departure from the theretofore uniform interpretation of the Wreck Act." This statement is unquestionably true. No court prior to the instant case had held that the Government could recover removal expenses in an *in personam* action. A starting point in the jurisprudence is *Loud v. United States*, 286 Fed. 56 (6th Cir. 1923), which involved an *in personam* action by the Government against the owner of a sunken vessel to recover the amount expended in straightening the vessel so as to clear the channel. The Court of Appeals dismissed the libel saying (p. 59):

> "It is equally clear that the owner of a vessel is not personally liable for the expense incurred by the Government in removing obstructions to navigation under the authority of this section (33 U.S.C.A., § 415), but, on the contrary, that the claim for such expenses must be asserted directly against the vessel and its cargo."

To the same effect is *United States v. Bridgeport Towing Line, Inc.*, 15 F. 2d 240 (D. Conn., 1926).

One of the more important cases is *The Manhattan*, 10 F. Supp. 45 (E.D. Pa., 1935), affirmed 85 F. 2d 427 (3rd Cir. 1936), *cert. denied sub. nom. United States v. The Bessemer*, 300 U.S. 654. There, the Tanker BESSEMER,

owned by Atlantic Refining Company, collided with and sank the Government Dredge MANHATTAN. The collision liability was litigated, and the District Court held that the collision and the subsequent sinking of the MANHATTAN were caused solely by the fault of the BESSEMER. 3 F. Supp. 75 (E.D. Pa., 1932). The matter was then referred to a Commissioner for determination of the Government's damages, which included an item covering the cost of raising the dredge, allegedly incurred under the Rivers and Harbors Act. The Commissioner concluded that the removal expense was not recoverable from the negligent BESSEMER since the Government was acting pursuant to a statutory duty, and said (p. 50):

> "So far as I know the right of recoupment against a tort-feasor who causes a sinking has never been asserted by the government in case the wreck was privately owned, and I can find nothing in the statute which creates such a right either in the case of privately owned vessels or those which are the property of the government. In fact, the rights in rem which are conferred would seem to negative that intent. At any rate the statute is silent upon the subject."

The Third Circuit affirmed the opinion of the District Court.

The import of *The Manhattan*, of course, is that the Government's claim for reimbursement of removal expenses is limited to the *in rem* claim against the wreck and its cargo, and that it may not obtain reimbursement from a tortfeasor. To the same effect are the decisions of the Ninth Circuit in *The Texmar (United States v. Bethlehem Steel Corp.)* 319 F. 2d 512 (1963), *cert. denied*, 375 U.S. 966, and of the Fourth Circuit in *United States v. Moran Towing and Transportation Company, supra.*

The *Texmar* involved a claim by the Government against Bethlehem Steel Corporation, as owner of the TEXMAR, and Calmar Steamship Corporation, as charterer and operator, to recover expenses incurred in raising the TEXMAR from a navigable channel where it allegedly constituted an obstruction to navigation. The Government alleged that the vessel had sunk as a result of the negligence of both of the respondents. A motion to dismiss for failure to state a claim was sustained by the District Court and affirmed by the Ninth Circuit, which held that Congress, though dealing in detail in the Rivers and Harbors Act of 1899 with the problems arising out of wrecks and obstructions to navigation, did not, though it could easily have done so, create an *in personam* right to recover removal expenses. In the concurring opinion of Judge Duniway it is said (p. 521) that "(the statute) **does not provide for liability on the part of the owner or anyone else if the proceeds of the sale are insufficient to pay the government's costs.**" This statement is, of course, important because the right to reimbursement was asserted not only against the vessel owner, Bethlehem, but also against its charterer and operator, Calmar.

In *United States v. Moran Towing and Transportation Company, supra,* similar claim was asserted against Bethlehem Steel Corporation, as owner of a floating dry dock, and against Moran Towing and Transportation, whose tugs had the dock in tow when it sank. The District Court held for the Government on the grounds, first, that the floating dry dock was not a vessel, and, second, that if it was, its grounding was intentional. On appeal the Fourth Circuit held that the sinking was not intentional, and went on to hold (p. 669) that even if the sinking was negligent, "Neither Bethlehem nor Moran (the tower), after the tendered abandonment, had any obliga-

tion to remove the obstruction created by the sunken dry dock and no *in personam* liability to reimburse the United States for its costs * * * ."

The two *Zubik* cases in the Third Circuit are to the same effect. *Zubik v. United States*, 190 F. 2d 278 (CA 3, 1951), and *United States v. Zubik*, 295 F. 2d 53 (CA 3, 1961). In the latter Zubik case, the Government conceded that a remedy by way of damages was not explicitly accorded by the Statute, but argued that one should be implied. After an exhaustive analysis of the statute, the Court of Appeals said (p. 57):

> "The sum total of the statutory scheme, excepting its criminal penalty provision, evidences that the forfeiture right accorded to the Government to remove wrecks obstructing navigable waters is in the nature of an *in rem* right against the removed vessel and not an *in personam* right against the vessel's owner."

The only case that may be considered out of line in the jurisprudence is *United States v. Hall*, 63 Fed. 472 (1st Cir. 1894). That case involved an intentional sinking, and the Court issued an injunction under the Rivers and Harbors Act of 1890 to compel the removal of the wreck. For reasons which we will develop later, *Hall* does not bear analysis. The Court of Appeals for the Second Circuit in *United States v. Wilson*, 235 F. 2d 251 (1956), which will also be discussed at length later, refused to follow *Hall*.

We repeat—there is no other case, either before or after the instant one holding that the Government may recover removal expenses from a tortfeasor, and there is no case other than *Hall* holding a sunken vessel to be an obstruction under Section 403 (§ 10).

The weakness of the Government's position in this and in other cases, notably *Texmar*, is indicated by its "bootstrap" reliance on a regulation of the Corps of Engineers. 33 C.F.R. § 209.410. This self-serving regulation provides that a person who negligently sinks a vessel in a navigable waterway may be compelled to remove the wreck or pay for its removal. The Court in *Texmar* disposed of this argument by characterizing the regulation as "an unauthorized effort to administratively improve the statute." (p. 520) However, in another administrative interpretation of the statute, the Department of the Army took a contrary view, saying:

> "In removing an abandoned sunken vessel from the navigable waters of the United States, the United States is limited in its recovery to the value of the vessel and its cargo. A claim for further reimbursement against the owners may not be made." Department of the Army pamphlet 27-164, "Military Reservations and Navigable Waters" (July 1961), pp. 181-182.

THE DECISION BELOW IS ERRONEOUS. IT IS BASED UPON A MISCONCEPTION OF THE DOCTRINE OF ABANDONMENT AS APPLIED TO NEGLIGENTLY SUNKEN VESSELS, A MISINTERPRETATION OF THE WORD "OBSTRUCTION" CONTAINED IN SECTION 10 OF THE WRECK STATUTE AND THE UNAUTHORIZED CREATION, BY IMPLICATION, OF A NONEXISTENT REMEDY.

If the decision below were a beacon light, giving for the first time, penetrating and accurate illumination in what the Fifth Circuit has described as "the statutorily muddied waters surrounding sunken vessels," (R. 158) the refusal to follow or be influenced by the decisions of

the other Circuits might conceivably be justified. Solitude or uniqueness does not alone condemn a decision as unsound, but where, as here, that decision is contrary to the uniform rulings of the Courts of Appeal of the Second, Third, Fourth and Ninth Circuits which considered the same questions and the same statutes, its soundness must meet the test of critical analysis. This it does not do.

A.

THE COURT OF APPEALS ERRED IN RULING THAT ONLY AN INNOCENT OWNER CAN ABANDON HIS SUNKEN VESSEL.

The District Court stated the issue as "whether or not the United States may recover damages from the owners or operators of vessels which have been sunk in a navigable stream with or without the negligence of the owners and operators thereof and subsequently removed from the navigable stream by the United States Government and at its expense." The District Court ruled that the only right which the Government has to recover the cost of raising negligently sunk vessels is a right *in rem* against the vessels themselves and that "there is no right, *in personam*, against the owners of the vessels, where the owners of the vessels have abandoned them to the Government." (R. 147) Faced with this ruling concerning the operative effect of abandonment on the rights and liabilities of the parties, the Court of Appeals in the instant case avoided that issue completely by ruling that only an **innocent** owner can abandon his sunken vessel. This distinction between negligent and innocent sinkings is contrary to the principles of maritime law which antedated the Wreck Statute and is without any support in the applicable provisions of that Statute.

Historically, the owner of a sunken vessel could aban-

don her without responsibility for the expense of removal. The right to abandon was not predicated upon the cause of the sinking. The loss of the craft was no less a loss to the owner because the sinking had resulted from negligence. *The Manhattan, supra; The Texmar, supra.*

The above principle was carried over into the Wreck Statute. After providing that "it shall not be lawful to * * * voluntarily or carelessly sink, or permit or cause to be sunk, vessels or other craft in navigable channels," the Statute goes on to provide that the owner has the duty to mark the wreck and to maintain the marks until the sunken craft is **removed** or **abandoned.** The section concludes by placing a duty on the owner of immediate removal with the provision that a failure to do so shall be considered an **abandonment** of the craft and subject it to removal by the United States. Rivers and Harbors Act of 1899 § 15 (33 U.S.C. § 409).

It is abundantly clear that, although by statute the negligent sinking of a vessel is unlawful, the duties of both the owner and the Government after the sinking are not related, in any way, to the cause of the sinking. It is also clear that the right, indeed the obligation, of the Government to remove the obstruction is based on the theory that "if the sunken vessel is a menace to navigation its disposition is a matter of public concern". *The Manhattan, supra;* see also, *The Texmar, supra.*

That the Wreck Statute recognized and preserved the right of abandonment given by the general maritime law and the correlative limitation of the Government's right against the world to an *in rem* claim is evident from the following language in *Petition of Highlands Navigation Corporation*, 29 F. (2d) 37, 38 (2 Cir. 1928):

> "The Rivers and Harbors Act of March 3, 1899 (U.S. Code, Title 33, [33 U.S.C.A.] §§ 409, 414, 415), recognized the right of abandonment given by the general maritime law, and points out the intention of Congress to preserve that right."

The Court of Appeals for the Fourth Circuit in the case of *United States v. Moran Towing & Transportation Company, supra,* considered this issue of sufficient importance to require the following subheading in its opinion: "Does the Presence of Negligence Defeat the Right of Abandonment?" In answering that question in the negative, the Court said (p. 666):

> "The District Court rejected the contention that when a vessel founders as a result of negligence attributable to the owner, the owner has no right of abandonment under the Wreck Act. Here the United States strongly urges its contention that the owner does not, and it now has the support of a recent decision of the Fifth Circuit in United States v. Cargill, Inc., 5 Cir., 367 F. (2d) 971. We agree with the District Court."

On page 667, the Court continued:

> "In contrast, there has been a recognized right of abandonment of a wrecked vessel, unless scuttled intentionally, without any *in personam* liability for the cost of its removal even if it is an obstruction of navigable waters. This was the assumption of the Congress which enacted the Wreck Act. That was the conclusion of the Court in The Manhattan (United States v. Atlantic Refining Co.) E.D. Pa., 10 F. Supp. 45, citing Winpenny and Chedester v. Philadelphia, 65 Pa. 135. Abandonment had been recognized in § 8 of the Act of September 19, 1890, 26 Stat. 450, which was substantially repeated in 1899 as § 19 of the Wreck Act. The addition of the provisions of § 15 significantly worked no change in the provisions of the 1890 Act."

In an effort to support its conclusion that a vessel owner "may not insulate himself from liability for proved negligence", the Court of Appeals in the instant case refers to the essential federal interest which the Government has in the Mississippi River, as a national highway which must be protected. (R. 162, 163) This, says the Court in *Moran Towing* is offset by a "long history of governmental encouragement and support of water-borne commerce." The effect of placing a premium upon negligence with its consequent denial of statutorily accorded relief is considered in *Moran Towing* (pp. 668-669):

> "*Cargill* adds the rationalization that the nation's waterways exist and, at considerable expense, are maintained by the government for public use, and that no one with substantial impunity ought to be allowed negligently to create obstructions in them. There has been, however, a long history of governmental encouragement and support of water-borne commerce. The modern ship construction and operating subsidies are extreme examples. It has thus been thought that the theory of the abandonment principle was that the owner who has lost his vessel has suffered all the economic loss which should be visited upon him, and that removal of the wreck, if it constitutes an obstruction to commerce, should be a public obligation. **The risk of such liabilities might be a very substantial deterrent of maritime activity or the acceptance of hazardous cargo.** The owner of the barge laden with chlorine gas with which *Cargill* dealt is an example. The Government's claim exceeds $3,000,000." (Emphasis supplied.)

This Court knows that Saturn space vehicles are moving by barge from Huntsville, Alabama, to New Orleans, Louisiana, and to the Mississippi Testing Facility and from these points to Cape Kennedy. Petroleum, chemical and other exotic cargoes are being moved daily by barge

and towboat on the Mississippi River and other inland waterways as are fuel, arms, and munitions for the armed forces. The new liability sought to be imposed upon water carriers in the instant case may well require them to limit their operations to the run of the mill, non-hazardous cargo. The language of the Fourth Circuit in *Moran Towing* shows that that Court also recognized that the nature of these cargoes makes it imperative that the rights and remedies of all those interested, including the Government, be at all times clear. (p. 669)

> **"Moreover, since in almost every foundering there will be some basis for a claim of negligence on the part of the owner or operator, extension of an *in personam* liability for a negligently created obstruction would, result in great uncertainty and extensive litigation before the obligations of the owners and operators can be ascertained. The old rule, the one which logically derives from the statutes, at least has the virtue of clarity and certainty in application."** (Emphasis supplied.)

The Court of Appeals in the instant case was not able to point to any language in any section of the Wreck Statute which either expressly or by inference supported its conclusion concerning the right to abandon. It based that conclusion upon what it arbitrarily states is a "correct reading of the statute". (R 162) No other court has so read the statute and no other court has required "innocence" to be a prerequisite. This misreading of the Statute is an error of fundamental importance because only by denying a negligent vessel owner the right to abandon could the Court of Appeals lay the foundation for its holding concerning *in personam* liability. Had the Court of Appeals conceded that right, it would have been required to affirm the District Court.

B.

THE COURT OF APPEALS ERRED IN RULING THAT A SUNKEN VESSEL CONSTITUTES AN OBSTRUCTION TO NAVIGATION UNDER SECTION 10 OF THE RIVERS AND HARBORS ACT OF 1899.

Section 403 (§ 10) was part of a scheme to solve problems **other than sunken vessels** which constituted obstructions. After this Court in *Willamette Iron Bridge Co. v. Hatch*, 125 U.S. 1, 8, ruled that there was no "common law of the United States" which prohibited obstructions in navigable waters and that it rested with Congress to fill the gap, Congress promptly passed an act controlling the height, span, and placement of bridges, and bridge piers and abutments. Rivers and Harbors Appropriation Act of 1888, 25 Stat. 400, 423, 424, 425. Two years later, Congress made it unlawful to cast off stone, earth, rubbish, wreck, or other waste of any kind which might obstruct navigation. It was made unlawful to build any wharf, dam, breakwater or structure of any kind which might obstruct navigation and prohibited the creation of any obstruction, not affirmatively authorized by law, to the navigable capacity of any waters of the United States. Sunken vessels were not considered within the purview of these sections inasmuch as they had been separately dealt with in 1890 when Congress amended prior wreck statutes to provide that wrecks which were not raised within two months were subject to be broken up or removed without liability for any damage to the owners. 26 Stat. 454, Section 8.

The River and Harbors Act of 1899, 30 Stat. 1121, 1151-1155 brought all of the prior statutes together in revised form. The bill was presented to Congress as a codification of existing laws with no essential changes. 32

Cong. Record 2297 (Senate) and 2923 (House). It is significant that Congress did not merge the sections relating to obstructions (structures) not affirmatively authorized by law and the sections relating to sunken vessels, and it is significant that different remedies were provided.

For years the Government has contended, without success (until the decision of the Fifth Circuit in this case), that such a merger exists. It has needed a judicial declaration that the creation "of any obstruction, not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States" as set forth in § 10 (Section 403) included sunken vessels, for otherwise the injunctive relief provided in § 12 (Section 406) would not be available, and the Government would be compelled to follow and be bound by the procedural requirements of §§ 15 and 19 (33 U.S.C. § 409 and 33 U.S.C. § 414).

Not only is there no historical justification for expanding the "structures" which are proscribed by § 10 (Section 403) to include "obstructions," regardless of their nature or how they got there, but to do so is violative of a common sense construction of its provisions. The section, on its face, deals with entities which are immovable and permanent and which involve construction; none of these attributes is possessed by sunken vessels. The first phrase of § 10 (Section 403) prohibits obstructions "not affirmatively authorized by Congress." This phrase would be completely redundant if it included sunken vessels because Congress, in other sections, had made it unlawful to "voluntarily or carelessly sink, or permit or cause to be sunk, vessels or other craft in navigable channels."

The Court of Appeals in the instant case based on its decision primarily on the opinion of the First Circuit in

United States v. Hall, supra. In that case a vessel was intentionally scuttled, and the Government brought an action to compel the defendants to remove the hull on the ground that it constituted an obstruction to navigation. The Court held that § 10 of the Rivers and Harbors Act of 1890 was intended to apply to all obstructions of a permanent character, not authorized by law, and that vessels sunk in harbors by the voluntary act of their owners were obstructions within the meaning of **that** § 10.

The § 10 of the Rivers and Harbors Act of 1890, under which *Hall* was decided, was substantially different from § 10 (Section 403) of the present Statute. It provided:

> "That the creation of any obstruction, not affirmatively authorized by law, to the navigable capacity of any waters, in respect of which the United States has jurisdiction, is hereby prohibited. * * * Every person and every corporation which shall be guilty of creating or continuing any such unlawful obstruction in this act mentioned, or who shall violate the provisions of the last four preceding sections of this act, shall be deemed guilty of a misdemeanor * * * [T]he creating or continuing of any unlawful obstruction in this act mentioned may be prevented and such obstruction may be caused to be removed by the injunction of any circuit court * * * ."

There was, accordingly, express authority for the injunctive process.

An identical contention was made in *United States v. Wilson,* 235 F. 2d 251 (2d Cir. 1956). There the United States brought an action to compel the defendants (successive owners of a sunken barge) to remove a sunken barge from the Hudson River on the authority of *Hall.*

There was some evidence that the barge had been deliberately scuttled, but no finding to that effect. The Court first held that § 10 of the 1890 Statute, which prohibited both the creation and continuance of an obstruction and afforded injunctive relief, was repealed by the 1899 Statute. It then passed to the question of whether or not the Government was entitled to an injunction under the later Act, saying (p. 253):

> "Thus the problem is resolved to this: Is the Government entitled to an injunction under the later Act?
>
> "As to this, the only section of the later Act which contains injunctive provisions possibly applicable here is § 12, 33 U.S.C.A. § 406. The injunctive power so provided, is expressly limited to 'the removal of any structures or parts of structures erected in violation of the provisions of' §§ 9, 10 and 11 of the 1899 Act. 33 U.S.C.A. §§ 401, 403 and 404. Clearly, our sunken barge is not a structure prohibited by §§ 9 and 11 which were concerned with bridges, dams, piers, wharves, etc. Nor, we hold, was it a 'structure' as denounced in § 10, 33 U.S.C.A. § 403. In re Eastern Transportation Co., D.C., 102 F. Supp. 913. That section prohibits, first, 'The creation of any [unauthorized] obstruction * * * to the navigable capacity' of United States waters, and, second, the building of 'any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other **structures**' in any port, etc. (Emphasis supplied.) It thus makes a plain distinction between 'obstructions' and 'structures.' Section 12, 33 U.S.C.A. § 406, deliberately we think, restricts its injunctive power to 'structures' and thereby excluded from its injunctive scope the 'obstructions' denounced by § 10, 33 U.S.C.A. § 403. This construction, which we think required by the plain language of the Act and its context, is corroborated by the strong intimations of §§ 15 and 19, 33

U.S.C.A. §§ 409 and 414. Since the injunctive powers conferred by § 12 are limited to the removal of structures violating §§ 9, 10 and 11, clearly they do not extend to violations of §§ 15 and 19. Under § 15 it is the duty of the owner of a sunken craft to commence the immediate removal thereof. But failure to remove is 'considered as an abandonment' thereof which is ground for removal **by the United States** as provided by § 19. And § 19 confers power on the Secretary of War to remove the craft with provision (not to charge the cost of removal to the owner) to forfeit the craft to the contractor employed to accomplish the removal.

"Thus we find nothing in the 1899 Act which justifies an injunction whereby the cost of removal may be saddled upon any of these defendants. This conclusion is in accord with In re Eastern Transportation Co., supra. On this ground we hold that the dismissal was rightly granted."

The distinction between "obstructions" under the Wreck Statute (§§ 15, 16, 19 and 20 [33 U.S.C. §§ 409, 411, 412, 414 and 415]) and "structures" under § 10 (33 U.S.C. § 403), which the Court of Appeals below refused to recognize, is clearly set forth in *United States v. Moran Towing and Transportation Company, supra*, (p. 662):

"It is readily apparent that the Rivers and Harbors Act of 1899 was concerned with two, largely if not wholly, mutually exclusive classifications. In §§ 401 and 403, there are prohibitions against the construction of bridges, dams, dikes, causeways, walls, piers, dolphins, booms, weirs, breakwaters, bulkheads and jetties without the prior approval of the Chief of Engineers and the Secretary of the Army, if they extend into or over navigable waters. Excavating, filling or altering the course or capacity of any port, canal or channel is similarly prohibited, unless authorized, and the prohibitions of § 403 are introduced by a general prohibition of any

obstruction to the navigable capacity of waters without congressional authorization. **These prohibitions are directed, generally, to structures and the product of construction work deliberately erected or created and intruding into or over navigable waters. The primary remedy provided for the removal of any such unauthorized structure is a mandatory injunction requiring its creator to remove the structure or obstructions. The removal, of course, is at the expense of the offender.**

"In contrast, §§ 409, 411, 412, 414 and 415, collectively known as the Wreck Act, apply to obstructions in navigable waters created by vessels or other craft anchored, moored or sunk in navigable waters." (Emphasis supplied.)

Although conceding that the cases of *United States v. Bethlehem Steel Corporation*, 235 F. Supp. 569 (D. Md. 1964); *United States v. Perma Paving Co.*, 332 F. (2d) 754 (2 Cir. 1964) and *United States v. Republic Steel Corp.*, 362 U.S. 482 did not deal with sunken vessels, the Court of Appeals here concluded that they afford support for its conclusion that the injunctive remedy accorded by § 12 (Section 406) is applicable to such obstructions. (R. 161)

The decision of the District Court in *Moran Towing (United States v. Bethlehem Steel Corporation)* was reversed on February 10, 1967. The decision of the Court of Appeals for the Fourth Circuit in that case has been discussed herein at some length. On the issue at hand that Court declined to follow *Hall* and ruled that § 10 (Section 403) was not applicable.

Before considering the *Perma Paving* and *Republic Steel* cases it should be pointed out that Clause 3 of § 10 (Section 403) states

"* * * and it shall not be lawful **to excavate or fill,** or in any manner to alter or modify the

> course; location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same. Mar. 3, 1899, c 425 § 10, 30 Stat. 1151." (Emphasis supplied.)

Perma Paving involved the removal of silt which had been forced into a channel by reason of the defendant's overloading of its property. The Court ruled that a violation of the abovementioned prohibition against filling channels had occurred, and concluded that inasmuch as the Government could have forced Perma Paving to remove the silt, it could recover its reasonable expenses in doing so. In discussing the question of *in personam* liability, reference was made to the cases holding a negligent owner of an abandoned shipwreck immune from personal liability for its removal and the Court said at 332 F. (2d) 758:

> " * * * **It is enough here that the detailed provisions with respect to wrecked vessels contained in** 33 U.S.C. §§ 409, 411, 412, 414 and 415, **afford a far stronger basis for immunizing the owners of wrecked vessels from in personam liability for the costs of removal than any of the statutes relevant to this case.** Indeed, the author of the principal opinion in the Bethlehem case [Texmar] seemingly assumed that the Government could have recovered the costs of dredging the channel on the facts in Republic Steel." 319 F. (2d) 518. (Emphasis supplied.)

After discussing the fundamental differences between actions which involve a deliberate violation of § 10 (Section 403) and the rights which are accorded the owner of a sunken vessel unless the sinking was intentional, the

Court in *Moran Towing* had this to say concerning both *Perma Paving* and *Republic Steel*, (p. 668):

> "If there was a recognized immunity from an *in personam* liability for the excess cost of removal of an abandoned wreck when the Congress enacted the Wreck Act in 1899, there can be no logical inference of liability in this area by analogy to *Republic Steel* or *Perma Paving*. All of the relevant cases, far closer to the understanding and assumptions of the times than we, find such an immunity predating or implicit in the Wreck Act. This lends weight to their expositions, and undermines any analogy to be drawn from *Republic Steel* and *Perma Paving*." (footnote omitted.)

The Court of Appeals in *Moran Towing* was of the view that the ruling of this Court in *Republic Steel* did not justify an extension of § 10 (Section 403) to shipwrecks, beyond the *Hall* exception of a deliberate scuttling. 374 F. (2d) at pp. 666, 667.

The Court of Appeals in *Texmar* also found *Republic Steel* to be distinguishable. It pointed out that this Court had treated the silting of the river bottom as the creation of an obstruction within the meaning of 33 U.S.C. § 403 (§ 10) and that if the injunctive relief provided by 33 U.S.C. § 406 (§ 12) was not available, the free navigability of the channel would be seriously impaired and Republic Steel Corp., by repeatedly paying the fine imposed by Section 406 (§ 12), would, in effect, be operating under a license. It found that situation to be clearly distinguishable from an obstruction created by the wreck of a vessel and declined to find a remedy based upon inference. It also declined to accept the implied right to injunctive relief against depositing more industrial waste in a river as creating an implied cause of action to collect indemnity from a vessel owner for the removal of a wreck.

The Court of Appeals for the Third Circuit in the *United States v. Zubik, supra*, also declined to equate an implied right to injunctive relief with an implied cause of action to recover removal expenses. In rejecting that argument, the Court said (p. 58):

> "United States v. Republic Steel Corp., supra, has no impact upon the issue in the instant case. The questions there presented and decided are entirely unrelated to the problem here involved."

Thus, alone, among all the circuits which have considered this question, the Court of Appeals for the Fifth Circuit finds a vessel an obstruction under § 10 (Section 403) and therefore subject to the injunctive power of § 12 (Section 406). The only alleged support it has is *Hall* and that decision is distinguishable, both upon its facts and the statute which it construed.

C.

THE COURT OF APPEALS ERRED IN RULING THAT THE RIGHT OF THE GOVERNMENT TO RECOVER REMOVAL EXPENSES IS IMPLIED.

Having held that the Government by injunction may compel removal of a vessel negligently sunk, the Court of Appeals, conceding that the statutes do not specifically authorize a suit by the Government for the recovery of removal expenses, based the existence of such a right upon implication. It reasons that it is illogical to assume that having been given the right to remove a sunken vessel the Government "in order to gain full benefit from the statutory provisions must wait for the slower injunctive process." It writes off the *in rem* remedy, which is expressly provided, by stating that it flows from the ownership of

the vessel and was not intended to "preclude recovery of reasonable removal costs from a tortfeasor." (R. 158)

The ultimate conclusion that the *in personam* remedy exists by implication must necessarily be based upon the foundation that none of the provisions of the Wreck Statute apply; that §§ 10 and 12 (Sections 403 and 406) are alone controlling and that the right to injunctive relief carries with it an alternative remedy. If, as we have demonstrated, a sunken vessel is not a § 10 (Section 403) "obstruction", then the injunctive remedy of § 12 (Section 406) is not available and there remains nothing upon which an implied right or remedy may be based. Congress has declined to create such a right, and the Court of Appeals was without justification in doing so. The Court in *Texmar* declined to read anything into the Statute. It stated (319 F. (2d) at p. 520):

> "Looking to the Rivers and Harbors Act for the answer to our problem, as we think we must, we find that Congress, though dealing in detail with the many problems arising out of wrecks and obstructions to navigation, has not, though it would have been natural and logical for it to have done so if it so desired, created the right which the Government here asserts.
>
> "We conclude, then, the Congress, in the light of the historical law of shipping, which seems to have included a right of an owner to abandon a wreck with impunity, probably did not intend to create, in the Rivers and Harbors Act, the obligation *in personam* which the Government here asserts. **If we are correct in this estimate, this court should not read such an obligation into the statutes."** (Emphasis supplied.)

On the question of the obligation of the courts to refrain from creating a new liability when Congress has

declined to do so, this Court in *United States v. Standard Oil Company of California, et al*, 332 U.S. 301, 316-317, said this:

> " * * * Here the United States is the party plaintiff to the suit. And the United States has power at any time to create the liability. The only question is which organ of the Government is to make the determination that liability exists. That decision, for reasons we have stated, is in this instance for the Congress, not for the Courts. **Until it acts to establish the liability, this Court and others should withhold creative touch.**" (Emphasis supplied.)

Judge Duniway, in his concurring opinion in *Texmar*, also warned against "judicial legislation". He said (319 F. (2d) at p. 522):

> "I do not think that the Courts should invent such a result when the Congress has not provided for it. **The matter should be left to the Congress, so that the conflicting interests can be heard and the relative merits of their varying positions can be evaluated, first by appropriate committees and then by the Congress as a whole.**" (Emphasis supplied.)

Similarly, in *Zubik*, the Court said (295 F. (2d) at p. 58):

> "The Government's contention that the Rivers and Harbors Act should be given a construction by the courts to accord remedies not therein 'explicitly accorded' because the legislation 'contemplates' the asserted remedies is plainly an effort to achieve judicial legislation. The teaching of the Supreme Court to the contrary since the beginning of our constitutional government is so manifest that citation is not required.
>
> "It is the province of Congress and not that

of the courts to legislate and where Congress has legislated in a particular field explicitly and with definiteness as it has in the Rivers and Harbors Act for the courts to expand the periphery of the legislative scheme would be judicial trespass."

The Court of Appeals in the instant case relies upon *Republic Steel* as support for its conclusion that Congress intended that appropriate civil remedies could be inferred even though, because of lack of clarity, the statutes do not so provide. (R. 163, 164) Before discussing *Republic Steel* in this connection, we quote the words of Judge Duniway in *Texmar* in answer to the assertion that the providing of a civil remedy had escaped the attention of the draftsman. He said (319 F. (2d) at p. 521):

> " * * * My reading of this statute leads me to believe that Congress, in enacting them, did put its mind on the question now before us and intended that the liability should be limited to whatever the United States can get for the vessel * * * ."

After considering the various provisions of the Wreck Statute dealing with removal of sunken vessels and the expense incurred in connection therewith, Judge Duniway went on to say (p. 522):

> " * * * It even expressly dealt with failure or refusal by the owner to reimburse the United States for such expense. **The only remedy it provided was a sale of the craft or cargo, the proceeds to be covered into the Treasury. Surely the alternative of a remedy by suit against the owner for the amount of the expense could not have escaped the attention of the draftsmen, but they did not provide for it."** (Emphasis supplied.)

It has been heretofore pointed out that *Republic Steel* did not involve sunken vessels nor a consideration of any

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CARD 6

of the provisions of the Wreck Statute which deal with such craft. The Courts which decided *Moran Towing*, *Teximar* and *Zubik* all concluded that *Republic Steel* is distinguishable. None of them accepted that decision as supporting the broad proposition that courts are not required to take a statute as it finds it.

This Court in *Republic Steel* ruled that § 10 (Section 403) "defines the interest of the United States which the injunction serves", 362 U.S. at p. 492. On the same page, the opinion goes on to state that Congress "has provided enough federal law in § 10 from which appropriate remedies may be fashioned even though they rest on inferences. Otherwise we impute to Congress a futility inconsistent with the great design of this legislation." In the case at bar, it is crystal clear that § 10 (Section 403) does not define the "interest of the United States" which is to be here protected, and unless this Court is prepared to disregard all of the provisions of the Wreck Statute and to find that § 10 (Section 403) is alone controlling, it cannot justify even the existence of an injunctive remedy, let alone the right to recover the expenses of removal. The Court, in *Republic Steel*, found it necessary to "fashion a remedy based upon inferences" to avoid the "imputation of Congressional futility". The "futility" does not exist in connection with sunken vessels. When they become obstructions, each procedural step is spelled out in unmistakable language, and a remedy is provided. To base another and completely different remedy upon an inference would do violence to all accepted concepts of legislative construction.

In *Perma Paving* the Court was also dealing with § 10 (Section 403). The Court, itself, recognized that the detailed provisions relating to wrecked vessels set forth in

33 U.S.C. §§ 409, 411, 412, 414 and 415 (§§ 15, 16, 19 and 20) were not involved (332 F. (2d) at p. 758). Its ruling represents an extension of the remedy of injunctive relief to permit the recovery of damages by the Government. The Court in *Moran Towing* was of the view that (374 F. (2d) at p. 667):

> "* * * *Perma Paving* added a reasonable and logical remedy for the rectification of an established wrong; if one can be required by an affirmative injunction to remove the silt he has deposited in a navigable channel, he may be required to reimburse the United States for its reasonable costs in effecting the removal for him".

The supplementing of an established remedy is far different than the creation, by implication, of a new and different one. There is no sound analogy to the present situation to be drawn from either *Republic Steel* or *Perma Paving*.

The error of the Court of Appeals for the Fifth Circuit's reading into the current Statutes, by implication, the remedy the Government seeks is made more evident by a reading of English Wreck Statutes and the Canadian Wreck Statute, both of which provide for *in personam* liability in connection with the removal of wrecks.[1] Such remedies, where intended by Legislators, are easily and clearly set out and require no implication. The creation or fashioning of new legal remedies, as the Government and the Court of Appeals for the Fifth Circuit in the instant case would undertake, properly and traditionally is a function of the Legislature and not the Courts. This is made startlingly clear by the fact that four members of Congress, obviously recognizing that the applicable stat-

[1] Please see pertinent portions of Canadian and English statutes in Appendix E.

utes do not provide the *in personam* remedy the Government seeks, in recent years have introduced no less than six bills to authorize the United States to recover, from sources other than the wreck itself, the costs incurred in removing wrecks from navigable waters.[2] All of these bills have been referred to the Committee on Public Works. Congress now is attempting to provide the remedy the Government seeks in this case. This is as it should be, for there all of the many interests involved properly and adequately can have their positions presented. The creation of the new remedy the Government seeks in the instant case, if it is to be created at all, is not the function of the Judicial system and should be left to the Congress.

THERE IS NO PROVISION IN THE DISASTER RELIEF ACT, EXPRESS OR IMPLIED, TO PERMIT THE GOVERNMENT TO RECOVER DISASTER RELIEF EXPENDITURES FROM THE CITIZENRY.

In Article VIII of its libel the Government alleges that on October 10, 1962 the "casualty was proclaimed a major disaster" under the provisions of the Disaster Relief Act, Public Law 875, 81st Congress, 42 U.S.C. § 1855, *et seq.* and in Article IX that "the tanks were removed with extreme care against any puncture and with a mobilization of the Civil Defense, Public Health and State Authorities under the Disaster Relief Act * * * ."

Section 1855 of Title 42 of the United States Code declares the intent of Congress to be "to provide an orderly and continuing means of assistance by the Federal Gov-

[2] H.R. 11727; June 24, 1964, Representative Robert McClory. H.R. 11822; June 29, 1964, Representative Robert E. Jones. H.R. 2100; January 7, 1965, Representative Robert E. Jones. H.R. 2842; January 14, 1965, Representative John S. Monagan. H.R. 17371; August 26, 1966, Representative Frank Horton. H.R. 10593; June 6, 1967, Representative John S. Monagan.

ernment to States and local governments in carrying out their responsibilities to alleviate suffering and damage resulting from major disasters, to repair essential public facilities in major disasters, and to foster the development of such state and local organizations and plans to cope with major disasters as may be necessary." There is nothing in the Act itself nor in the legislative history of the Act to support any claim that the participating federal agencies may seek reimbursement from private parties who could be said to have created the disaster. Nor is there any basis in the common law for such a remedy. See, for example, *Williamette Iron Bridge Co. vs. Hatch*, 125 U.S. 1; *Village of Palmyra vs. G. S. Warren et al*, 114 Ill. App. 562 (3rd Dist., 1904); *Thornton vs. The Livingston Roe*, 90 F. Supp. 342 (S.D. N.Y. 1950).

Although the libel plainly indicates that the funds sought to be recovered were not disbursed by the Corps of Engineers under its appropriation for administering the Rivers and Harbors Act of 1899, but were allocated by executive proclamation under the Disaster Relief Act of 1950, the Government has not nor can it show any legal basis or Congressional intent permitting the sovereign to recoup disaster relief costs from the citizenry.

CONCLUSION

The Wreck Statute provides for, and the jurisprudence has consistently recognized, a difference between obstructions or structures erected or created by design, intention, and calculation on the one hand, and sunken vessels or shipwrecks on the other. Clearly, Section 406 (§ 12), providing for injunctive relief, has no application to negligently sunken vessels, and personal liability for the cost of removal on the part of the shipowner or any other party cannot be implied. The decision of the Court of Appeals

for the Fifth Circuit holding to the contrary should be reversed, and the judgment of the District Court in favor of petitioners reinstated.

Respectfully submitted,

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PROOF OF SERVICE

I, Benjamin W. Yancey, one of the attorneys for petitioners herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the day of , 1967, I served copies of the foregoing Brief on respondent United States of America by mailing a printed, bound copy thereof in a duly addressed envelope, with air mail postage prepaid, to The Solicitor General, Department of Justice, Washington 25, D. C.

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